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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GTE MIDWEST INCORPORATED,
Cross-Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Cross-Respondents.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

GTE MIDWEST'S REPLY TO BRIEFS IN OPPOSITION

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INTRODUCTION

As GTE has already made clear, none of the questions presented in the original petitions in this case merits this Court's review. Nevertheless, the Briefs in Opposition to GTE's Conditional Cross-Petition strikingly confirm that *if* the Court grants certiorari on Question 2 presented by the FCC, it should also review *all* the questions in the cross-petition. Cross-respondents concede, as they must, that review on GTE's first question would be warranted. The Eighth Circuit, after all, explicitly linked its ruling that incumbents cannot be required to provide pre-assembled packages of elements (on which the FCC seeks review) and its decision allowing entrants to rely solely on network elements to provide service (on which GTE seeks review). *See* AT&T App. 55a-57a, 70a-71a.

And it is hardly surprising that cross-respondents protest against any grant on the other questions GTE raises. They would like as much as possible to limit review to the one major aspect of the duty to provide unbundled network elements on which they lost below. Thus, they accuse GTE of seeking to weigh down the question on which *they* want review with unrelated and "uncertworthy" issues in an effort to "discourage a grant of certiorari" on the issue *they* want granted. AT&T Br. at 3.

When the rhetoric is stripped away, however, cross-respondents offer no serious rebuttal to undermine the integral connection GTE has outlined between the three questions in the cross-petition and Question 2 in the FCC's petition. One of the central issues confronting the Eighth Circuit was ensuring that, taken as a whole, the FCC's rules would not distort the congressional scheme for promoting competition by permitting access to network elements to become an end-run around the Act's provisions for reselling finished services. Numerous decisions by the FCC played a part in expanding the unbundling duty so that network elements might be used

effectively as a substitute for finished service. The Eighth Circuit focused on *one* of those decisions and, based on the text of section 251(c)(3), ruled that a critical limitation preventing such an end-run was the requirement new entrants would have to shoulder the burden of combining separated elements for themselves. At the same time, the Court of Appeals accepted the FCC's expansive reading of other statutory terms that, properly read, would have placed important and complementary limits on the unbundling duty.

As a result, if the Court of Appeals' decision under section 251(c)(3) is to be reconsidered, this Court must also bring before it the FCC's overly expansive interpretations of *other* sections of the Act -- particularly the definition of network elements and the standards for unbundling defined in section 251(d)(2). It is obvious that the FCC's decisions on all of these issues operated together to expand the duty to provide network elements far beyond any duty to provide access to the "essential facilities" of the local network that might be needed by new entrants. Indeed, it is precisely because the FCC expanded access to "network elements" into access to *all* important aspects of an incumbent LEC's business that the FCC's rules, taken together, would have had the undeniable effect of eviscerating the Act's separate resale provision.

Thus, only by reviewing all of the questions presented by GTE's conditional cross-petition will the Court be able to reconstruct, based on each of the statutory sections defining the duty to provide network elements, a properly balanced understanding of the Act. If it does not grant on these questions, the Court would run the risk of removing the restriction that the Eighth Circuit thought critical without even having before it the other decisions expanding the unbundling duty that would have to be reconsidered to preserve the statutory structure intended by Congress.

I. GTE's Conditional Cross-Petition In No Way Suggests that Certiorari Is Warranted on the Questions Presented in the Original Petitions.

After conceding that it would be improper to grant certiorari on the FCC's Question 2 in isolation, cross-respondents attempt to suggest that the cross-petitions demonstrate that certiorari is warranted in this case. Thus, they would like to pretend that simply by filing conditional cross-petitions, GTE and other incumbent LECs have somehow confirmed that the Eighth Circuit's decision freeing incumbents from the obligation of providing network elements in pre-assembled packages was a critical ruling that will, in itself, determine the course of competition in local telephone service. *See, e.g.*, AT&T Br. at 8. Nothing could be further from the truth. GTE and other incumbent LECs have filed conditional cross-petitions solely to ensure that *if* the Court grants review on one issue that played a part in producing, overall, a balanced interpretation of the duty to provide network elements, it will also consider the proper interpretation of the other statutory sections that further define the contours of the same duty. Nothing in that effort to ensure that the Court will have before it all the sections bearing on the same matter in any way suggests that certiorari is warranted in the first instance on the question of pre-assembled packages of network elements.

II. Cross-Respondents Offer No Plausible Justification for Denying Certiorari on Questions 2 and 3 in GTE's Conditional Cross-Petition.

A. Cross-Respondents Offer No Rational Distinction That Warrants Severing Questions 2 and 3.

Having acquiesced in a grant on GTE's Question 1, cross-respondents focus their attacks on offering a series of spurious distinctions in an effort to prevent the Court from considering Questions 2 and 3. First, AT&T proclaims that GTE "concedes that those claims are not independently certworthy." AT&T

Br. at 3. *See also* MCI Br. at 7. But that should come as no surprise. As emphasized above, GTE's position is that *none* of the questions presented, either in the original petitions or in the cross-petitions, is *independently* worthy of certiorari. The entire point of a conditional cross-petition is not to assert claims that a party believes would merit review standing on their own, but rather to ensure that *if* an opponent succeeds in having the Court grant review on one facet of a decision, related aspects of the decision will also be brought before the Court so that the Court will have before it all the interrelated issues that must be harmonized in reconstructing a complete interpretation of a statute.

Similarly, cross-respondents' related assertion that the second and third questions in GTE's petition involve only a "straightforward application of *Chevron*," MCI Br. at 7, provides no basis for distinguishing those questions from the others that have been presented to the Court. Every question presented in all the petitions in this case involves only an application of settled *Chevron* principles and the construction of a statutory text. The only distinction that respondents can seem to muster between the questions on this score is that they lost below on the question they want reviewed and, to obtain review on that issue, they must perforce acquiesce in a grant on the first question GTE has presented. That self-serving distinction, however, provides no principled basis for severing the second and third questions in GTE's cross-petition.

Finally, cross-respondents attempt to disparage the connection between the questions GTE has raised and their question, as they repeatedly assert that GTE's issues involve interpretation of different statutory sections from the question they have presented and charge that "the only connection among GTE's disparate claims is that each represents a distinct legal theory by which GTE seeks to force new entrants to . . . 'shoulder [some] additional costs.'" AT&T Br. at 3-4. Once

the overwrought rhetoric is stripped away, however, it is plain that cross-respondents' arguments lack substance.

The Eighth Circuit made it clear that one of the critical issues of statutory interpretation it faced was ensuring that the FCC's rules did not undermine the structure of the Act by making unbundled elements simply an end-run around the Act's provisions governing resale of finished services. The Court thus stressed that the limitation imposed by the text of section 251(c)(3) provided a critical distinction that would preserve access to network elements and resold service as distinct routes of entry. *See* AT&T App. at 55a-57a. But other sections of the Act -- in particular, the definition of network elements and section 251(d)(2) (which sets the standards to be considered in determining what elements should be unbundled) -- also imposed critical restrictions that were intended to play a role in preventing unbundled elements from becoming an end-run around resale. The FCC, however, ignored those restrictions, and its errors were not corrected by the Eighth Circuit. Indeed, it was through its overly expansive reading on each of the issues presented by GTE that the FCC obliterated any notion that access to network elements was designed to grant entrants the access they might need to the "essential facilities" of the local network and instead transformed unbundling into guaranteed access to every important aspect of an incumbent's business. It was that radical expansion of the duty that threatened completely to undermine the Act's separate resale provisions.

Thus, contrary to AT&T's charge that the only connection between the issues GTE has presented is that each can be used to impose "costs" on entrants, it should be plain that the issues are interrelated because each addresses a portion of the statutory limitations defining the scope of the unbundling obligation imposed by Congress. If this Court is going to reopen the construction of *one* of the statutory terms defining the unbundling requirement, it is imperative that it also bring

before it the lower court's decisions construing the *other* sections of the Act that fill out the contours of that same duty -- decisions that, in GTE's view, erroneously accepted the FCC's over-expansive reading of the Act. If the Court does not grant review on these related questions, it runs the risk that, having brought before it only a fraction of the rulings that together defined the scope of the unbundling duty, it will not be able to reconstruct a balanced reading of the Act that preserves the statutory scheme Congress intended.

And that is precisely the end-game that cross-respondents would like to achieve: a limited grant of certiorari restricted as narrowly as possible to the issue concerning unbundled elements on which they lost below. In that way they can ensure that review in this Court will be a one-way ratchet: if this Court agrees with them, they will remove a limitation on their use of unbundled elements and the Court will not even have the option of re-evaluating the construction of the *other* statutory terms that, properly read, impose other countervailing limitations on the scope of the unbundling obligation -- limitations that, like the particular limitation acknowledged by the Eighth Circuit, would also preserve the statutory scheme envisioned by Congress by preventing unbundled elements from becoming and end-run around the Act's resale provisions.

B. Cross-Respondents' Efforts To Defend the Merits of the Decisions Below Provide No Basis for Denying Review on the Second and Third Questions in the Cross-Petition.

Having failed to establish any principled basis for severing the second and third questions in GTE's conditional cross-petition from the first, cross-respondents turn their efforts toward defending the substance of the FCC rules GTE has attacked.

To start, cross-respondents attempt to confuse matters concerning the unbundling of operational support systems

(OSS) by pointing to some items that, in the loosest sense, might be grouped with OSS, but that also fall within the statutory definition of network elements. For example, respondents focus on the information contained in databases that would be needed for billing. *See, e.g.*, FCC Br. at 14. There is no dispute, however, that under the plain terms of the statutory definition, access to "information sufficient for billing" is required. But by diverting attention to that non-issue, cross-respondents would like to obscure the real controversy presented by OSS. The heart of the problem is proprietary software systems that incumbents have developed to run business functions such as their billing and collections departments. While the statute may give entrants the right to access to *information sufficient for billing*, that in no way gives entrants the right to an incumbent's proprietary system for processing billing information, preparing bills, and tracking customers' accounts.[1]

Similarly, cross-respondents have no plausible response to defend the FCC's decision to treat operator services as a network element. Recognizing that live operators cannot plausibly fit within the statutory terms "facility or equipment," cross-respondents attempt to divert attention from the agency's overbroad reading of the Act by asserting that operator services "increasingly take the form of automated programs." FCC Br. at 15; AT&T Br. at 13; MCI Br. at 4. The extent to which computers may be replacing people, however, is beside the point. The FCC is still attempting to classify the operator who answers a customer's call as a "facility or equipment"subject to sale to a competitor as a "network element." AT&T's

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[1] Cross-respondents also assert that the FCC had another, independent reason for requiring access to OSS -- the theory that such access was necessary for making access to other elements "nondiscriminatory." But that third-tier justification for the rule was regarded as such an obviously insubstantial make-weight that the Eighth Circuit did not even address it below.

assertion that this should come as no surprise because all network elements require "live persons to operate them," AT&T Br. at 13, is also a complete non sequitur. Normally, when an entrant buys a network element, it does not also buy an incumbent's customer-service personnel. Rather, it seeks the element, particularly an operating system or information in a database, so that its *own* employees (for example, its customer-service representatives) can use the system themselves. Cross-respondents' cavalier indifference to the radical control the FCC would give entrants over an incumbent's business shows that at bottom the FCC and its supporters view the unbundling provision of the Act as a virtually limitless duty giving entrants an unfettered ability to treat any incumbent LEC as a nationalized company that may now be used -- in its entirety -- by any newcomer wishing to set up a "competing" business.

Cross-respondents fare no better in defending the FCC's rules purporting to implement section 251(d)(2). While Congress commanded that before ordering the unbundling of any element the FCC must consider whether access to proprietary elements was "necessary," and whether failure to provide access to other elements would "impair" an entrant's ability to provide service, the FCC concluded that this analysis could be accomplished without ever even considering whether there were alternative facilities available to entrants outside an incumbent's network.

Recognizing that the FCC's interpretation of the "necessary" and "impair" standards is, in fact, indefensible, AT&T attempts to ease its burden by distorting what the FCC's analysis actually requires. Thus, AT&T would like to soften the agency's ruling by pretending that the agency merely determined that the "*theoretical* availability of a network facility" from another source "*at a higher cost* to the new entrant does not foreclose access to that facility as a LEC network element." AT&T Br. at 2 (emphasis added). But the

FCC nowhere limited its decision to the "theoretical availability" of facilities at "a higher cost." Rather, the Commission categorically ruled that in determining whether access to elements was "necessary" or whether a failure to provide elements would "impair" an entrant's ability to provide service, no consideration whatsoever needed to be given to facilities outside the LEC's own network -- even if the facilities were currently available and at a comparable price. That rule plainly cannot be squared with the plain terms chosen by Congress.

Next, both the FCC and AT&T claim that the FCC's dilution of the statutory standards does not merit review in any event because Congress only directed the FCC to "consider" the "necessary" and "impair" standards, but did not assign those tests dispositive weight. FCC Br. at 16-17; AT&T Br. at 14. But even the case cross-respondents cite does not support this extraordinary claim. In *Time Warner Entertainment*, the D.C. Circuit made it clear that when a statute directs an agency to "consider" a particular factor, it requires that the agency "must reach an *express and considered conclusion* about the bearing of [that] factor." *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995) (internal quotations omitted) (emphasis added). Where the FCC has instead defined out of existence the standards set by Congress, it has plainly *not* reached any "express and considered conclusion" concerning the factors Congress specified, and thus has not complied with the Act.

Lastly, the FCC turns to a belated substantive defense of its actual interpretation of section 251(d)(2), and argues, in effect, that there would never be any point in having the Commission itself consider whether facilities were available outside an incumbent's network because, in its view, "as a practical matter," if such facilities existed and were *more* advantageous for an entrant, the entrant would choose to use them voluntarily. FCC Br. at 17. But it is transparent that this

reasoning completely abdicates the supposedly neutral role Congress directed the agency to take in evaluating whether such access was "necessary," or whether its absence would "impair" an entrant's ability to provide service, and substitutes in its place the automatic assumption that whenever entrants "would prefer access to the incumbent's elements over alternative sources," FCC Br. at 17, they must be allowed to have it. That is plainly not the standard set by Congress.

CONCLUSION

For the reasons outlined in GTE's Brief in Opposition and its Conditional Cross-Petition, GTE believes that the Court should not grant review in this case at all. If the Court grants review on Question 2 presented by the FCC, however, it should also grant review on all three questions presented in the Conditional Cross-Petition. At this early stage, the Court should not, as the FCC and its supporters suggest, be rushed into carving out one narrow aspect of the series of decisions reached below concerning the statutory duty to provide access to network elements. Rather, if the Court attempts to re-examine the lower court's construction of the unbundling duty at all, it should grant on all three questions presented by GTE to ensure that it will properly have before it all of the decisions that must fit together to produce a balanced reading of the Act that faithfully implements the structure intended by Congress.

Respectfully submitted,

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